OCT 5 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 481

PAUL SHEDD, Petitioner
versus
STATE OF MISSISSIPPI, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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Petitioner, Paul Shedd, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Mississippi entered in the above-entitled case on June 4, 1956.

CITATIONS TO OPINION BELOW

The opinion rendered on June 4, 1956, by the Supreme Court of the State of Mississippi, affirming the action of the trial court, is reported in Shedd v. State of Mississippi, 87 So2d, 898 (not yet officially reported in the Mississippi Reports), and a copy of said opinion is Appendix A hereto. This opinion became the final judgment and decision of the highest court in Mississippi in which a decision could be had when petitioner's Suggestion of Error was overruled on June 28, 1956, (not reported). A copy of the order overruling petition's Suggestion of Error is Appendix C hereto.

JURISDICTION

The opinion and judgment of the Supreme Court of the State of Mississippi is the highest Court in Mississippi in which a decision could be had. This petition is filed within the time allowed for petitioning for a writ of certiorari,

DARK PAGE BLEED THRU

pursuant to Rule 22. The jurisdiction of the Supreme Court to grant a writ of Certiorari and review this case is conferred by the Revised Rules of the Supreme Court, and by 28 U.S.C. Section 1257(3), which reads as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Petitioner claims, as the basis for jurisdiction of the Supreme Court, that the trial court, and the Supreme Court of Mississippi, by affirming the action of the trial court, has denied petitioner due process of law and equal protection of the laws as guaranteed to him under the Fourteenth Amendment to the Constitution of the United States, U.S.C.A., Constitution, wherein it is provided:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty,, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

DARK PAGE BLEED THRU

Petitioner did not directly and expressly raise the violation under the Fourteenth Amendment, but believes that the manner in which said questions were raised by petitioner in the trial court and in the Supreme Court of Mississippi shows a clear intendment of petitioner's claim that he was denied due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States. New York, ex rel. Bryant v. Zimmerman, 278 U. S. 63,67. Petitioner claimed in the Supreme Court of the State of Mississippi that his conviction was a violation of his constitutional rights, and that the construction and application of the grand larceny statute of the State of Mississippi also violated his constitutional rights. It affirmatively appears by the record and opinion of the Supreme Court of the State of Mississippi in overruling petitioner's Suggestion of Error, that the Supreme Court of the State of Mississippi rejected petitioner's claim that he was denied his constitutional rights. Also, petitioner thoroughly argued in the Supreme Court of Mississippi that, because of the errors assigned on the appeal, petitioner was denied due process and equal protection of the laws as guaranteed to him under the Fourteenth Amendment to the Constitution of the United States.

Petitioner claims that the Supreme Court of Mississippi has denied a federal question of substance in a way probably not in accord with the applicable decisions of the Supreme Court. Rule 19, 1(a).

QUESTIONS PRESENTED

1. Whether petitioner's trial and conviction for grand larceny upon an instruction for conspiracy was a denial to him of the right to be informed of the

nature and cause of accusation as guaranteed to him under the due process of law and equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States.

2. Whether the failure of the trial court to instruct the jury as to the meaning and definition of accessory before the fact in a grand larceny case is a violation of due process of law under the Fourteenth Amendment to the Constitution of the United States.

3. Whether the application of the Mississippi Statutes, as construed and applied in this case, makes said statutes ambiguous, inconsistent and repugnant to the Fourteenth Amendment to the Constitution of the United States, so that said statutes deny petitioner the right to be informed of the nature and cause of accusation, and the right to a fair trial, as guaranteed to him under the due process of law and the equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States.

STATUTES INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States, U.S.C.A., Constitution (Section 1 thereof, supra).

This case also involves the following Mississippi Statutes:

Section 2240 of the Mississippi Code of 1942, pertaining to grand larceny, and which reads as follows:

"Every person who shall be convicted of taking and

carrying away, feloniously, the personal property of another, of the value of twenty-five dollars or more, shall be guilty of grand larceny, and shall be imprisoned in the penitentiary for a term not exceeding five years."

Section 1995 of the Mississippi Code of 1942, pertaining to accessories before the fact, and which read as follows:

"Every person who shall be an accessory to any felony, before the fact, shall be deemed and considered a principal and shall be indicted and punished as such; and this whether the principal have been previously convicted or not."

Section 2056 of the Mississippi Code of 1942, pertaining to conspiracy, and which reads as follows:

"If two or more persons conspire either:

(1) To commit a crime; or

(2) ******

(3) ******

(4) To cheat and defraud another out of property by any means which are in themselves criminal, or which, if executed, would amount to a cheat, or to obtain money or any other property or thing by false pretenses; or

(5) ******

(6) ******

(7) To accomplish any unlawful purpose, or a lawful purpose by any unlawful means.

Such persons, and each of them, shall be guilty of a misdemeanor, and, on conviction, shall be fined not

less than twenty-five dollars, or shall be inprisoned not less than one month or more than six months, or both."

STATEMENT

Petitioner, Paul Shedd, was tried and convicted of grand larceny (which is a felony), at the July, 1955 Term of the Circuit Court of the Second Judicial District of Jones County, Mississippi, and was sentenced to five years in the State Penitentiary on said felony conviction. On the trial of the case, the State requested only one instruction. This instruction was an instruction on the theory of conspiracy, Shedd v. State of Mississippi (87 So2d, 898, 899). A copy of said instruction is Appendix D hereto. The State did not obtain any other instruction, and the jury was not instructed as to the definition of accessory before the fact, or the definition of conspiracy, whereas petitioner was indicted on grand larceny, under the above Code Section 2240, and convicted on the theory of the above only instruction on conspiracy, which is a separate and distinct crime, but is a misdemeanor under Code Section 2056, but yet the Supreme Court of Mississippi affirmed the conviction on the theory of petitioner being an accessory before the fact, but the jury was never instructed as to the definition of accessory before the fact. When petitioner went to trial, he defended on the theory of grand larceny. The Constitution of the State of Mississippi provides that the accused shall be advised of the nature and cause of accusation, Section 26, Mississippi Constitution of 1890. The record shows that petitioner was tried on a grand larceny charge (a felony), and convicted on an instruction on conspiracy (a midemeanor). cf. Appendix B and D.

Petitioner was tried for one crime and convicted on the theory of another crime, and petitioner could not have been convicted except upon the unfair application of the aforesaid instruction of the court, which, in effect, denied him the right to a fair hearing and a fair trial. The instruction of the trial court and the wrongful application of the aforesaid Mississippi Statutes denied petitioner the right to be informed of the nature and cause of accusation and due process and equal protection of the laws under the Fourteenth Amendment.

REASONS FOR GRANTING THE WRIT

1. The trial court and Supreme Court of Mississippi have decided a federal question of substance, in a way probably not in accord with applicable decisions of this court. In the case of Fiske v. State of Kansas, 47 S. Ct., 655; 274 U. S. 380; 71 L.Ed 1108, the court said:

> "A decision of a state court applying and enforcing a state statute of general scope against a particular transaction as to which there was a distinct and timely insistence that if so applied, the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is, therefore, reviewable****"
>
> "The result is that the Syndicalism Act has been applied in this case to sustain the conviction of the defendant, without any charge or evidence that the organization in which he secured members advocated any crime, violence or other unlawful acts or methods as a means of effecting industrial or political changes or revolution. Thus applied, the act is an arbitrary and unreasonable exercise of the police power of the state, unwarrantably infringing the liberty of the de-

fendant in violation of the due process clause of the 14th Amendment. The judgment is accordingly reversed, and the case is remanded for further proceedings not inconsistent with this opinion."

2. By the construction and interpretation of the Mississippi Statutes, and the instruction of the trial court, the State was permitted to apply the law pertaining to conspiracy (which is a misdemeanor), in order to sustain a conviction for grand larceny (which is a felony).

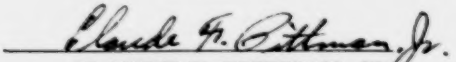
3. Clearly the question presented is of importance in the administration of criminal justice in state courts. The trial court and the unexpected and unanticipated ruling of the Supreme Court of the State of Mississippi has violated the fundamental concepts of liberty, the right to a fair trial and the right to be informed of the nature and cause of accusation, in violation of due process and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted and the case reversed.

Dated: October 1, 1956

Respectfully submitted



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APPENDIX A

OPINION OF THE SUPREME COURT OF MISSISSIPPI

IN THE SUPREME COURT OF MISSISSIPPI
No. 40,050

PAUL SHEDD
vs.
STATE

ETHRIDGE, JUSTICE:

Paul Shedd was convicted in the Circuit Court of the Second Judicial District of Jones County of grand larceny, and sentenced to five years in the state penitentiary. On this appeal he complains of the theory of the State as set forth in its only instruction to the jury on the merits.

There was ample evidence to warrant the jury in finding appellant guilty, upon the following facts substantiated by the testimony. On the afternoon of March 25, 1955, O. L. Jenkins, 54 years old and a resident of Ellisville, went to a place in Jones County known as the Pine Grove Cafe. He had recently received final payment on a house which he had sold, and had in his possession about $2,500. He was drunk at the time. He asked a 17-year old waitress in the place, Mrs. Vernon McRaney, to count his money for him, which she did. Jenkins stayed only a short time and left. Mrs. McRaney told the owner of the place, Cliff Pittman, about Jenkins' money. Several hours later, around 6:30 P. M., Jenkins returned. In a few minutes appellant Shedd came in the place. Pittman told Shedd about Jenkins' money. Shedd advised Mrs. McRaney to give Jenkins the date which he had requested at a tourist

court, and to get his money. She then told Jenkins she would do so, and they agreed on a price of $20. She, Shedd and Pittman were to split the money three ways. They also decided that Mrs. McRaney would take Jenkins to the Rock Cabins, a tourist court, and that she would try to get him more drunk than he was before taking his money.

Mrs. McRaney drove Jenkins to the tourist court, where they got a cabin. Mrs. McRaney prentended to take a shower bath, and secretly removed from Jenkins' wallet, which was in his trousers hanging on a chair, the sum of $1,308. On the pretense of going to the office of the tourist court to get some cigarettes, she left the cabin with Jenkins' money. At the office, Shedd was waiting for her. Shedd then drove her back in a car to the Pine Grove Cafe. He and Mrs. McRaney decided to double-cross Pittman, so she told Pittman she did not get any of Jenkins' money. Later Shedd took all of the money, and refused to divide it with Mrs. McRaney. So she testified for the State, along with Jenkins, and Debbs Mauldin, operator of the tourist court. Defendant did not testify and offered no evidence. It is manifest that the evidence was ample to warrant appellant's conviction of grand larceny, either as a participant in the crime, or an aider and abettor, which are in effect the same. Moreover, Code of 1942, Section 1995, provides that "every person who shall be an accessory to any crime, before the fact, shall be deemed and considered a principal."

Appellant was indicted for grand larceny. The State was granted this instruction: "The Court instructs the jury for the state that if you believe from the evidence in this case beyond a reasonable doubt that Virna L. McCranney and Paul Shedd conspired together to take, steal and carry away the money of

O. L. Jenkins, on the date and at the time alleged and that in pursuance of said conspiracy of agreement, if you believe from the evidence beyond a reasonable doubt there was such a conspiracy or agreement, that Virna L. McCranney did wilfully, and feloniously take, steal and carry away the sum of Thirteen Hundred and Eight Dollars ($1308.00) in current and lawful money of the United States of America, of the value of Thirteen Hundred and Eight Dollars ($1308.00) consisting of Thirteen One Hundred Dollar Bills, one Five Dollar Bill and Three One Dollar Bills, the personal property and money of O. L. Jenkins, then it is your sworn duty to find the defendant Paul Shedd guilty as charged."

Appellant says that this was prejudicial error; that a conspiracy to commit a felony is a misdemeanor, under Code Section 2056; and that, although appellant was indicted for grand larceny, this instruction submits to the jury not that issue but whether appellant was guilty of a conspiracy to commit a felony, which is a misdemeanoor.

The instruction was proper on either one of two theories. If two or more persons enter into a combination of confederation to accomplish some unlawful object, any act done by any of the participants in pursuance of the original plan and with reference to the common object is, in contemplation of law, the act of all. 11 Am. Jur., Conspiracy, Sec. 8; 15 C. J. S., Conspiracy, Sec. 74. Illustrative of this principle is Huggins v. State, 149 Miss. 280, 115 So. 213 (1928). Huggins and Walton formed a common design and conspiracy to rob a storekeeper. The latter surprised Huggins, shot at him, and Huggins ran away down the street. The storekeeper then ordered Walton to sit down in the store until the police arrived, but before they did

so, Walton shot and killed the storekeeper. The above stated principle was applied in affirming a conviction of Huggins for murder, although when the murder occurred Huggins was down the street and away from the premises. The instruction in question properly advised the jury that if the woman and Shedd conspired together to steal Jenkins' money and that "in pursuance of said conspiracy or agreement" if any, the woman stole Jenkins' money, then Shedd was guilty of grand larceny. The common design and the purpose of the confederation or conspiracy was to take the money of Jenkins unlawfully. The theft was the natural and intended result of this common design, for which Shedd was just as guilty as was Mrs. McRaney.

Furthermore, all persons present at the time and place of a crime, and aiding and abetting, assisting or advising its commission, are guilty as principals to the crime. 22 C. J. S., Criminal Law, Sec. 88. Aiding and abetting in the commission of a crime involves a community of unlawful purpose at the time the act was committed. It involves some participation in the criminal act, in furtherance of the common design either before or at the time that the criminal act is commited. McNeer v. State, No. 40,099, decided May 28, 1956.

Shedd falls clearly within this definition of an aider and abettor and therefore a principal in the crime. He and Mrs. McRaney formed this unlawful purpose, at his instance, and in furtherance of the common design and while she was in the tourist cabin, Shedd, who had previously followed her there, was waiting at the office of the tourist court for her. After Mrs. McRaney stole the money, he drove her away from the scene of the crime and appropriated the money for himself.

Shedd aided and abetted in the commission of the crime. The use of the word "conspired together" in the instruction for the State, was, we think, synonymous with the forming of a common design and purpose, and was not used in its limited technical, legal sense of a conspiracy as a misdemeanor. So when considered in this manner, the instruction properly advised the jury under the facts that, if it believed that the woman and Shedd formed a common design and purpose to steal the money of Jenkins and that in pursuance of that common design the woman feloniously stole the money, then Shedd is guilty as charged. Compare Gibbs v. State, 77 So. 2d 705 (Miss. 1955).

AFFIRMED.

ROBERDS, P. J., AND HALL, KYLE AND GILLESPIE, JJ., CONCUR.

Tr. R. 89-93

END OF APPENDIX A

APPENDIX B

IN THE SUPREME COURT OF MISSISSIPPI

PAUL SHEDD, Appellant

vs.

STATE OF MISSISSIPPI, Appellee

No. 40,050

SUGGESTION OF ERROR

QUITMAN ROSS
Laurel, Mississippi
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Laurel, Mississippi
Attorneys for Appellant

It is respectfully suggested that the court erred in the following particulars in affirming the conviction of this appellant:

1. The Court held him to be a principal to the commission of grand larceny at a time when he was not present, aiding or abetting in the commission of said crime.

2. In holding the instruction complained of to be a proper one on the theory that the act of one conspirator in the furtherance of a conspiracy previously formed is the act of all. The latter is unquestionably a correct statement of law, but wholly inapplicable to this case.

The appellant has no quarrel with the law as announced by the court, but respectfully and sincerely differs with its ap-

plication of the law. In its practical application, **Section 1995, Code of 1942,** simply make an accessory before the fact indictable and punishable as a principal. He still must be tried as an accessory. The Court has now held, and it is useless to argue, the facts in this case to warrant a conviction as an accessory before the fact. But the appellant certainly was not a principal in fact, and no words of this court or anyone else may make him such. In reversing Williams vs. State, **128 Miss. 271; 90 So. 886,** which case was cited in the original brief, the court pointed out that Williams was not in the bank at the time the forgery of the signature of Mrs. Butler was placed upon the check. Here Shedd was not present at the time Mrs. McRaney stole the money from Jenkins. After pointing out this fact, the court said:

> "If he was guilty of the offense charged, it was on the theory that he was an accessory before the fact."

If Shedd is guilty, it must be on the theory that he was an accessory before the fact, and if so, the granting of the instruction originally complained of was reversible error because that instruction made no mention whatever of accessory, nor did it undertake in any way to define or set out what constitutes an accessory before the fact. In the Williams case, the court said further, speaking of the instruction there complained of:

> "It merely charges that, if the defendant had knowledge of the forgery as set out in the indictment above and was a party to the forgery, 'then it is your sworn duty to find him guilty as charged even though you may believe that he did not write Mrs. Mattie Butler on the back of the check, ".

If the principal of law just quoted is still the law, then Shedd has been unlawfully convicted.

As to the second principle, the opinion correctly states the law of conspiracy, but here again, the trouble is that the rule stated is not applicable to this case. If Shedd is to be convicted for conspiracy to commit grand larceny, then he should have been indicted for conspiracy so to do, and may not lawfully be condemned on an indictment charging him with grand larceny. Candor compels the admission that if the uncontradicted proof is to be believed, he actually did conspire with McRaney and Pittman to steal the money of Jenkins, and the money was stolen in furtherance of this conspiracy. The latter act was not necessary to complete the crime of conspiracy and was an entirely independent and different transaction.

It is felt that this affirmance has come about because of an inadequate presentation of appellant's case to this court, because unquestionalby the law is plain and without complications, but apparently was not presented with sufficient lucidity to bring to the attention of the court the precise contentions of the appellant. If he is guilty of grand larceny, such should have been proven, but was not. If he is guilty of grand larceny by being an accessory before the fact, he should have had this issue presented to the jury in a proper instruction defining accessory before the fact and leaving it to the just to determine from all the facts whether he was guilty. Here we have the ridiculous situation of one shown to be guilty of conspiracy and grand larceny by virtue of being an accessory before the fact to the latter, indicted and convicted for grand larceny but tried for conspiracy. If the appellant is guilty of either one of these offenses, he may be again convicted on a proper

indictment for conspiracy or on a proper trial for grand larceny. If he has to go to the penitentiary, he at least has the right to go there after a lawful trial for the offense charged and he is entitled under the Constitution to be informed of what that offense is.

The former opinion of the court should be withdrawn, this suggestion of error sustained, and the cause remanded to the court below for a lawful trial of appellant for one or both of the offenses of which the court now says he is guilty.

Respectfully submitted,

/s/ QUITMAN ROSS
PAUL G. SWARTZFAGER
Attorneys for Appellant.

Tr. R. 95-98

END OF APPENDIX B

APPENDIX C

Thursday, June 28th, 1956 Court Sitting:

Paul Shedd

40,050 vs.

State of Mississippi:

This cause this day came on to be heard on the suggestion of error filed herein and this court having sufficiently examined and considered the same and being of the opinion that the same should be overruled doth order and adjudge that said suggestion of error be and the same is hereby overruled.
Minute Book "BL" Page 222
Tr. R. 99

APPENDIX D

INSTRUCTION REQUESTED BY THE STATE

State

vs.

Paul Shedd

The Court instructs the Jury for the State that if you believe from the evidence in this case beyond a reasonable doubt that Virna L. McCranney and Paul Shedd conspired together to take, steal and carry away the money of O. L. Jenkins on the date and at the time alleged and that in pursuance to said conspiracy or agreement, if you believe from the evidence beyond a reasonable doubt there was such a conspiracy or agreement that Virna L. McCranney did wilfully, unlawfully and feloniously take, steal and carry away the sum of Thirteen Hundred and Eight Dollars ($1308.00) consisting of Thirteen One Hundred Dollar Bills, One Five Dollar Bill and Three One Doll Bills, the personal property and money of O. L. Jenkins, then it is your sworn duty to find the defendant Paul Shedd guilty as charged.

Given
Filed July 18, 1955
Winston T. Shows
Circuit Clerk
Jones County, Miss.

Tr. R. 5